D.B. Central Excise Appeal No.06/2006.
(Hindustan Zinc Ltd. Vs. Dy. Commissioner, Central Excise & Customs Division, Bhilwara)

DATE OF JUDGMENT : 29.08.2006

HON'BLE MR. RAJESH BALIA, J.
HON'BLE MR. GOPAL KRISHAN VYAS, J.

Mr. Dinesh Mehta for the appellant.
Mr. Kuldeep Mathur for the respondent(s).

The following substantial questions of law have been raised for consideration in this appeal arising out of the order passed by Customs, Excise & Service Tax Appellate Tribunal in Appeal No.E/4471/04/NB(S) dated 10.06.2005 :

"(i) Whether in the facts and circumstances of the case, the learned Tribunal was legally justified in dismissing the Appeal, filed by the Appellant ?

(ii)Whether in the facts and circumstances of the case, the Appellant was not entitled to avail credit of Rs.2,45,867/- in the Financial Year 2000-2001, particularly in wake of the fact that the spare parts (capital goods) in question were received in fag end of financial year and there was no condition of installation for taking of the credit with respect to spares ?

(iii)Whether in the facts and circumstances of the case, the Appellant was not entitled to avail entire credit in the Financial Year succeeding the year, in which the goods have been received in the factory as provided under Rule 57AG (1)

of Central Excise Rules, 1944 ?

(iv)Whether in the facts and circumstances of the case, the learned Tribunal was legally justified in confirming the oder of Assessing Officer and Appellate Authority recovering Duty and also upholding the levy of penalty of Rs.1.00 lacs imposed under Rule 173Q(1)(bb) of Central Excise Rules, 1944 ?"

The basic facts in the back-drop of which the aforesaid questions have arisen are that the appellant is engaged in the manufacture of concentrates from the ores of lead and zinc. Until 31.03.2000, the appellant was entitled to avail mod-vat credit only on the installation of the capital goods even though received by it and meant to be used by it in the manufacture of the products.

With effect from April 01, 2000, new CENVAT Rules came into force. Under the new rules, instead of waiting until installation of such capital goods, it could avail CENVAT credit of the duty paid on capital goods used by it in the manufacture, on receipt of such capital goods in the factory in two installments – the first installment of 50 per cent of the duty paid on capital goods could be availed in the year in which the capital goods were received in its factory and balance 50 per cent of duty later on in subsequent financial year after its installation.

The new rules created a transitory position in respect of capital goods received during financial

year ending on 31.03.2000 but were not installed before commencement of financial year on 01.04.2000, the date with effect from which the new CENVAT Rules had come into force. Since the manufacturer of goods had received such duty paid capital goods prior to 31.03.2000, they were not entitled to avail CENVAT credit in respect thereof on receipt basis until 31.03.2000. Under CENVAT Rules, too, they could not have received the benefit of credit on receipt basis during the financial year 2000-2001 on the principle adopted under the Rules for availing MODVAT in two installments.

In the present case, the appellant has received the capital goods in its factory prior to March 31, 2000 but, under the existing scheme, it was not entitled to avail mod-vat credit until the capital goods were installed prior to March 31, 2000. The case of the appellant is that it claimed modvat credit in respect of the capital goods though received in the factory prior to March 31, 2000 but which were installed in April 2000 and, on installation, the appellant availed modvat credit of full amount which was objected to by the authorities of the Central Excise.

After issuing the show-cause notice for alleged wrongful availing of the 100 per cent modvat credit, the Assistant Commissioner disallowed the excess modvat credit availed by the assessee and ordered recovery of the same and also imposed a penalty in

respect of such excess availed CENVAT credit by resorting to the provisions of the Central Excise Rules 1944.

On appeal, the aforesaid order was affirmed by the Commissioner (Appeals) and, on further appeal, the order was affirmed by the Tribunal by order referred to above.

The appellant contended before the Tribunal that for the transit period the appellant's case is governed by the circular of the Board of Central Excise & Customs clarifying the position in respect of the situation like the one in which the appellant was placed. However, the Tribunal did not find itself convinced by the aforesaid contention on the ground that the circular referred to was applicable only in the case where the capital goods were installed prior to March 31, 2000 and not to those factories where goods were installed after 01.04.2000.

The modvat credit on the capital goods under the Central Excise Rules 1944 was allowable under Rule 57Q. Under clause (vii) of Rule 57Q, in respect of capital goods received in the factory on or before March 31, 2000, modvat credit in respect of the duty paid on capital goods was not allowable on a date prior to the capital goods were installed in the factory. Thus according to the existing rule 57Q, as on the date, the assessee has received the capital goods in his factory he was not entitled to avail the modvat credit in respect of such capital goods until

the capital goods were installed prior to March 31, 2000.

The scheme of modvat credit was, however, replaced by CENVAT Credit Rules 2000 which were to be effective from 01.04.2000. Under Rule 57AC, vide clause (c) CENVAT credit in respect of the capital goods could be availed on receipt of the capital goods in the factory in the year in which the capital goods were received. However, the amount of such CENVAT credit in the same financial year was not to exceed 50 per cent of the Duty paid on such capital goods. The balance of the credit may be taken in the subsequent financial year/years. Clause (c) thus envisaged that CENVAT credit can also be taken in respect of the capital goods as have been received in the factory but have not been installed subject to the condition that during the financial year 2000-2001 the credit shall be taken for an amount of not exceeding 50 per cent of the duty paid on such capital goods.

Apparently, the appellant's case fell under clause (c) of Rule 57AC so far as availing of CENVAT credit on receipt of capital goods received priot to 1.4.2000 is concerned.

However, the grey area remained about the petitioner's eligibility for the modvat credit in respect of 50 per cent Duty paid available to the assessee for capital goods received in the factory prior to 01.04.2000 but not installed prior to March 31, 2000 inasmuch as clause (c) of Rule 57AC of the

CENVAT Credit Rules 2000 envisages that credit may be taken in respect of capital goods received in the factory prior to 01.04.2000 but not installed prior to 01.04.2000 only to the extent of 50 per cent of the duty paid on such capital goods in the same financial year.

Since the availment of CENVAT credit has been delinked with actual installation, so far as duty paid on the capital goods is concerned, 50 per cent of CENVAT credit in respect of the goods received in the factory prior to March 31, 2000 would also be allowable as if the goods were received after March 31, 2000 in the factory. Once this credit was allowed in terms of clause (c) in respect of capital goods not installed prior to 01.04.2000, clause (c), sub-rule (2) of Rule 57AC should govern the field. This position further became clear with the introduction of Rule 57AG which provided for the transitional period. The natural corollary is that Rule 57AG envisages that any amount of credit earned by a manufacturer under rules 57A, 57B or 57Q, as they existed prior to April 01, 2000 and remaining unutilised on that day shall be allowable as CENVAT credit to such manufacturer under these rules, and be allowed to be utilised in accordance with these rules. In a way, Rule 57AG took care of untilised credit earned under Rule 57Q by the assessee prior to 01.04.2000 which has not been utilised by the assessee for payment of the duty which was payable by him. Perhaps because of this growing

controversy, the matter was referred to the Central Board of Excise and Customs and clarifications were required to be issued. The Board circular, referred to in the order of the Tribunal – so far as it relates to the present controversy, is encapsuled in para 9 and 10 of the circular which are reproduced hereinbelow :

> "9. Referring to sub-rule (2) (c) of rule 57AC, it has been pointed out that there are cases in which the capital goods were received before 1st day of April, 2000, and also installed before that date. However, the Modvat credit on the capital goods was not taken for some reason prior to 1-4-2000. It has been pointed out that in this situation, not being covered under rule 57AC (2) (c) the duty paid on the capital goods causes burden to the manufacturer. It has also been reported that in some cases the inputs were received in the factory on or before 31-3-2000 but credit was not taken for some reason. It is clarified that in the situations mentioned, even though the Modvat credit was not taken by the manufacturer, the Modvat credit had been "earned" by the manufacturer and, therefore, the manufacturer is entitled to take the CENVAT credit of this amount under Rule 57AG (1).
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> 10. Rule 57AC provides that CENVAT credit may be taken immediately on receipt of inputs in the factory. Some apprehensions have been expressed that if the CENVAT credit is not taken "immediately", like within 24 hours or so, the field officers may deny the CENVAT credit. The idea is that if the manufacturer desires he can take the CENVAT credit at the earliest opportunity when the inputs are received in the factory. This, however, does not mean, nor is it even intended that if the manufacturer does not take credit as soon as the inputs are received in the factory, he would be denied the benefit of CENVAT credit. Such an interpretation is not tenable."

The aforesaid two clarifications, read with the scheme of CENVAT Rules, covered under Rule 57AC and 57AG, leave no room for doubt that under the rules it was not intended to deny the manufacturer the benefit of any part of the MODVAT/CENVAT credit which the manufacturer had or could have earned in respect of the capital goods received in his factory prior to 01.04.2000 and that was made available to him under the new Scheme also.

It is precisely in this background that the assessee claimed that under Rule 57AC (ii)(c) that he was entitled to avail CENVAT credit on receipt of the capital goods which was received by him in the factory but were not installed before 31.03.2000 though he had received the same prior to 01.04.2000 and in terms of clause (c) of sub-rule (2) of Rule 57AC when he was entitled to CENVAT credit on the capital goods received in his factory he became entitled to the credit of MODVAT in terms of Rule 57Q as it existed before 01.04.2000 and on such MODVAT credit becoming due to him and which remained unabsorbed by him he became entitled to avail MODVAT credit; and, therefore, he availed 100 per cent MODVAT credit on the basis of reading the two rules together.

However, despite all these transitional provisions and clarifications in the circular one thing still remained with question-mark about the time when the manufacturer could avail the full MODVAT credit.

Having given our careful consideration to the

provisions of the statute and the clarifications issued by the Board, it becomes clear that after 01.04.2000 the availability of the CENVAT credit or earned MODVAT credit has to be availed in two parts. Firstly, 50 per cent MODVAT credit could be availed on mere receipt of the capital goods in the factory and after the receipt of the capital goods in the factory the subsequent installment of the CENVAT credit could be availed only in the subsequent financial year to the financial year in which the capital goods were received in the factory of the manufacturer provided that the capital goods are still in the possession and use of the manufacturer of the final product in such subsequent financial year. That only ensured that the capital goods received and installed by the assessee must be at least used for a reasonable period of more than one year in order to avail the full MODVAT/CENVAT credit.

Rule 57AG on which reliance has been placed by learned counsel for the petitioner also speaks that unutilised credit earned by the manufacturer under Rules 57A, 57B and 57Q shall be allowed to the manufacturer under the CENVAT rules only and shall be capable of being utilised in accordance with CENVAT rules only. Therefore, for availing the CENVAT credit in respect of the goods received prior to 01.04.2000 in the factory but installed and used after 01.04.2000 is also to be governed by the rules of availing the CENVAT credit under Rules of 2000 as amended from time

to time only and period of availing the CENVAT credit in respect of the goods received prior to 01.04.2000 is also governed by the rules governing the CENVAT credit and not MODVAT credit. No clarification in respect of this has also been issued by the Board in the circular referred to above. Therefore, it would be reasonable to infer that in respect of the capital goods received by the assessee prior to 01.04.2000 in his factory but which have not been installed until the commencement of the CENVAT rules he could avail the CENVAT credit in terms of Rule 57AC (2)(c) upto the amount not exceeding 50 per cent of the duty paid on such capital goods immediately on receipt basis and, thereafter, he could avail the remaining balance of the CENVAT credit in terms of clause (b) in any financial year subsequent to the financial year in which the capital goods were received in his factory provided the capital goods are still in his possession and use in that subsequent financial year.

In the present case, literally speaking, the subsequent year of the financial year in which the assessee has received the goods in his factory remains the assessment year 2000-2001 because admittedly the goods in the present case were received in the factory prior to 01.04.2000; and, clause (c) was only to extend the benefit of availing the MODVAT credit in respect of the duty paid on capital goods received prior to 31.03.2000 which otherwise would have been lost had it strictly been on the basis of receipt of

the goods and provision like clause (c) would not have been enacted.

It is possible to read clause (c) and clause (b) together to bring about the result which has been followed by the assessee.

However, so far as his availing the 100 per cent CENVAT credit is concerned it has now become academic and need not be the subject of further decision inasmuch as while the assessee was denied the 50 per cent of the credit in the financial year 2000-2001, the same has been allowed as availed by him in the subsequent financial year (2001-2002) in respect of the capital goods received in his factory before 01.04.2000. Therefore, the question of now making the adjustments further would not serve the purpose.

However, in the facts and circumstances, no case of penalty under Rule 57Q (bb) is made out. The key-word about the levy of penalty under clause (bb) of Rule 57Q is about the wrongful availing of the MODVAT credit which the manufacturer has reason to believe is not permissible under the rules. This is not the case herein. Therefore, the foundation of levy of penalty is that whether the assessee cannot hold a reasonable belief that CENVAT/MODVAT credit under the rules is not permissible. On the consideration of relevant rules and notifications, we are of the opinion that if the assessee reasonably believed that he is entitled to avail MODVAT/CENVAT credit in the manner in which he has availed, the penalty is not leviable.

In view of the complexity of the situation, in the absence of sufficiently clear provisions about the transitional period and the core area having been left unclarified for availing 100 per cent credit available on the duty paid on capital goods received in the factory prior to 01.04.2000 but installed in financial year 2000-2001 the credit utilized by the assessee on the reasonable belief that he is entitled to avail 100 per cent credit when he installed the capital goods could not be said to be baseless or imaginary exercise.

Consequentially, the appeal is partly allowed. The order to the extent of levy of penalty for availing 100 per cent credit after the machines were installed in the factory which were received prior to 01.04.2000 is set aside. No change is directed to be made for availing the 100 per cent credit in view of the full credit availed by the assessee over a period spread over two financial years from 01.04.2000.

There shall be no order as to costs.

(Gopal Krishan Vyas)J. (Rajesh Balia) J.

Ojha, a.